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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] /62

SELINA ROMMEL, ET AL., *Petitioners*,

v.

ROBERT F. KENNEDY, Attorney General, and as Successor to the Alien Property Custodian.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, Laura Irene de Courten, Selina Rommel, Nikolaus Rommel, and Candida Rommel, appellees below, pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-entitled cases.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court are unreported. They are set forth together with the judgment of that court at pages 55-64 of the certified transcript of the record herein (R. 55-64). The opinions of the Court of Appeals for the District of Columbia Circuit are not yet reported. They are set forth at pages 151-153 of the certified transcript of record herein (R. 151-153) and in Appendix A hereto (pp. A-1-A-3, *infra*). The judgment of the court is set forth at page 154 of the record and in Appendix B (pp. B-1-B-2, *infra*).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit, reversing the District Court, was dated and entered March 15, 1962 (R. 154). Since the *per curiam* opinion decided the cases solely on the authority of *N. V. Handelsbureau La Mola* v. *Kennedy*, 299 F. 2d 923 (U.S.C.A.D.C.). Appendix C (pp. C-1-C-7 *infra*), decided February 1, 1962 (R. 151 at 153) no petition for rehearing was filed. The jurisdiction of this Court is invoked under Tit. 28 U.S.C., Secs. 1254(1) and 2101(e).

QUESTIONS PRESENTED

Whether individuals who were resident within the territory of a neutral nation (Switzerland) at the time of the vesting of their property under the Trading with the Enemy Act, as amended, are "enemy" within the meaning of Section 2(a) of such Act, so as to preclude them from maintaining suits under Section 9(a) of the Act, for the return of such property, solely because they had previously resided within the territory of a nation (Germany) with which the United States was at war.

Whether if the Trading with the Enemy Act, as amended, were interpreted to include such residents of a neutral country within the definition of "enemy" the Act would come into conflict with the Fifth Amendment to the Constitution of the United States, by taking private property for public use without just compensation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Fifth Amendment to the Constitution of the United States, and Sections 2(a) and 9(a) of the Trading with the Enemy Act, 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§ 2(a) and 9(a) (1958), which are set forth in Appendix E hereto (pp. E-1-E-2, *infra*).

STATEMENT

A summary of the findings of the District Court follows: In 1951 the Attorney General of the United States by a series of vesting orders vested property of petitioners which consisted principally of remainder interests after a life estate in being in a testamentary trust and in an *inter vivos* trust. The life estate in each was that of Rosamond Blanchard de Courten, an American citizen. The value of the property in the trusts is in the area of one and one-half-million dollars.*

The two large trusts were established, one by Rosamond Blanchard de Courten, born Rosamond Dove Blanchard, at the time of her marriage, the other by

* Other trust interests of the same persons were vested in the same year, in addition to trust interests vested in 1947. These interests are of relatively small value, but all are included in the suits.

the will of her mother, Laura Dove Blanchard Duncan. These trusts and the other trusts were all established by members of the Blanchard family, an old New England family. All the trusts were made by deed or will in Massachusetts, became effective there, and have been administered in the Commonwealth of Massachusetts subject to its laws. They were established at various dates from 1903 to 1931.

There are four petitioners, the plaintiffs below. The first is Laura Irene de Courten, born in 1907, the daughter of Rosamond Blanchard de Courten, an American citizen, and of Carlo de Courten (deceased) who had Swiss and German citizenship. The remaining three plaintiffs are Selina, Nikolaus and Candida Rommel, the grandchildren of Rosamond Blanchard de Courten. They were born in 1934, 1936 and 1940. Since 1944 they have been orphans. Laura Irene de Courten had Swiss and German citizenship at her birth. The Rommel children were German citizens by birth.

Prior to the war Laura Irene de Courten lived with her parents in Germany, and from 1939 on, the Rommel children and their parents lived with them at Miesbach, a small town in Germany not far from Munich. After 1944, the family living at Miesbach consisted of Rosamond Blanchard de Courten, Laura Irene de Courten, and the three Rommel children, ranging (in 1944) from ten to four years of age. After the death of their parents in that year, Laura Irene was appointed their guardian by the Court of Guardianship at Miesbach.

In November 1945 Laura Irene and her mother were able to get permission to travel from Miesbach to Berne, Switzerland, which they did, Laura Irene traveling on a Swiss passport. Mrs. de Courten remained at Berne

and Laura Irene got authority from Switzerland to bring the Rommel children, who were German citizens, into Switzerland. She then returned to Miesbach and got permission from the Guardianship Court there and the occupation authorities to take the children to Switzerland. Her application to the Court at Miesbach stated that she was moving to Switzerland and would take the children with her. With Swiss visas, and travel documents from the Allied Occupation Authorities in Germany, Laura Irene de Courten took the three small children to Switzerland with the intention of taking up permanent residence there.

The family lived first in Worb, a small town in Switzerland near Berne, and later moved to Gstaad, a small town about 80 miles from Berne where they still live. The children attended various schools in Switzerland from 1946 on.

Laura Irene de Courten, in September 1946, asked for her release from German citizenship, and in November 1948 she was released from it.

In January 1949 the German Court of Guardianship at Miesbach consented to the taking over of the guardianship of the Rommel children by the Guardianship Authority at Saanen, Switzerland, and in June, 1949, Laura Irene de Courten was appointed their guardian by that Authority. In the years 1956 and 1958 the three Rommel children became naturalized Swiss citizens. Nikolaus Rommel did military service in the Swiss Army in 1957 and 1958.

The jurisdiction of the United States District Court for the District of Columbia was based upon Section 9(a) of the Trading with the Enemy Act, as amended, *supra* (hereinafter sometimes referred to as "the Act").

After trial, the District Court found that the petitioners herein were resident in Switzerland at the several dates of vesting in 1947 and 1951, and held on the authority of *Willenbrock* v. *Rogers*, 255 F. 2d 236 (3 Cir., 1958) Appendix D hereto (pp. D-1-D-6, *infra*) that they were not enemies within the definition in Section 2(a) of the Act, and were entitled to the return of their property interests (R. 62). The Court of Appeals, *per curiam*, reversed the decisions on the authority of *N. V. Handelsbureau La Mola* v. *Kennedy*, *supra*, App. C-1-C-7, decided after argument and before the decision of the cases at bar.* The ground of the decision on appeal is the interpertation of the Act as defining "enemy" to include any person who had been a resident of enemy territory at any time during the war, regardless of his residence at the time of the vesting orders.

REASONS FOR GRANTING THE WRIT

Introduction

The decision of the court below is in direct conflict with the decision of the Third Circuit Court of Appeals in *Willenbrock* v. *Rogers*, 255 F. 2d 236, rehearing denied (1958). Further there is virtually a dissent by Chief Judge Miller to the decision below, who concurring only in the result, states:

> "While this case was under submission, my brothers here and a third judge handed down a decision in *N. V. Handelsbureau La Mola* v. *Kennedy* which had been heard shortly before the hearing of the present appeals. As I did not participate in that case, I had no opportunity to protest against the decision rendered. Although I do not agree with

* That case is hereinafter referred to as "*La Mola*". A petition for a writ of *certiorari* in that case was filed in this Court on April 26, 1962.

> it, the *Handelsbureau* opinion is a binding precedent which requires reversal here. For that reason only, I concur in the result of the majority opinion in these appeals." (R. 153, App. A-3.)

Since the decision in the cases at bar is made to rest on the *La Mola* case, it is necessary to refer to it. In the *La Mola* case the court held that property of a Netherlands corporation could be vested and confiscated on the ground that the Netherlands had been occupied by the military and naval forces of the enemy, even though the vesting took place on December 15, 1950, several years after the enemy occupation ceased. The court states that, "The purposes of the Act are not fulfilled if all vesting and seizure must be accomplished during hostilities or enemy occupation." *Supra*, p. 925, App. C-3.

This statement as to the purposes of the Act is discussed in this Petition at pp. 14-16, *infra*. The only unfulfilled purported purpose, it is submitted, is to confiscate the foreign-owned property, not for use in the prosecution of the war, but merely to reduce the cost of the war to the United States. In the cases at bar that property is the American inheritances—future interests which had not come into possession and enjoyment—of the descendants of an American family.

In arriving at its decision in *La Mola*, the court below stated:

> "... [T]he definition of enemy in Section 2 of the Act ... is to be construed as including *a person who* or a corporation which, *at the time of the vesting order, is one who has been resident of an enemy* occupied nation during its occupation or was then incorporated under the laws of an occupied territory and resident therein." *Supra*, p. 926, App. C-4. (Emphasis added.)

This construction is in conflict with the common law decisions, beginning with *The Venus* (U.S.), 8 Cranch 253 (1814), which hold that enemy status based solely on residence, is lost upon a change of residence to non-enemy territory. The court's construction is contrary to the intention of the Act to mitigate the common law, rather than to make a more severe rule, and the legislative history shows this.

The Court of Appeals itself states that its decision "rests solely on a *technical* enemy status acquired by appellant" under the Act. *Supra*, p. 927, App. C-6. (Emphasis supplied.) It is submitted that it is shown herein that the court erred in its determination that such a technical enemy status existed at the time of vesting. The ensuing harsh consequences on these individuals should not be permitted to stand.

The court below in the *La Mola* decision concludes that there is no constitutional question present and inferentially, so concludes in the cases at bar. Petitioners urge that there is the same constitutional problem in these cases which this Court found in *Guessefeldt* v. *McGrath*, 342 U.S. 308 (1952), namely whether there is a confiscation in conflict with the Fifth Amendment, which protects citizens and aliens who are not enemies from a taking of property without just compensation.

I

THE DECISION BELOW IS SQUARELY IN CONFLICT WITH THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IN WILLENBROCK v. ROGERS, SUPRA, WHICH HELD THAT WHETHER ENEMY STATUS ATTACHES BY VIRTUE OF RESIDENCE IS TO BE DETERMINED BY THE ENEMY OR NON-ENEMY RESIDENCE AT THE TIME OF THE VESTING ORDER, AND THAT CONFLICT SHOULD BE RESOLVED BY THIS COURT

Prior to *La Mola, supra*, there was only one decision on the question whether residence in enemy territory prior to the date of vesting results in enemy status and the Third Circuit Court of Appeals in *Willenbrock* v. *Rogers, supra*, flatly decided that it does not. It explicitly ruled that enemy status attaching solely by residence in enemy territory is lost by permanent removal from the territory with respect to property not then vested. The substance of the Court's holding in that case is shown by the following pertinent quotation from Judge Goodrich's opinion:

> "It was mentioned that there are two vesting orders. One was in 1947 * * *, and the other was in 1950 * * *.
>
> "* * * The complaint in this case says that the plaintiff returned to the United States October 16, 1949 and took up her residence in the Eastern District of Pennsylvania. * * *
>
> "Assuming that it can be shown that the plaintiff was a resident of Pennsylvania beginning October 16, 1949, the provision of the statute discussed above [i.e., § 2(a) of the Trading with the Enemy Act] does not apply to her. The vesting order applies to the situation existing at its date. Swiss Nat. Ins. Co. v. Miller, 1925, 267 U.S. 42,

45 S. Ct. 213, 69 L. Ed. 504; Rudenberg v. Clark, D.C.D. Mass. 1947, 72 F. Supp. 381, 383. * * *"

> "It appears, therefore, that the judgment of the court below must be reversed as to the property included in the first seizure of 1947 but *as to that which was taken under the 1950 vesting order, it would appear that the plaintiff is entitled to recover if in fact she no longer was a resident of Germany when the 1950 order became effective.*" *Supra*, pp. 238-239, App. D-4-D-6. (Emphasis supplied.)

Willenbrock is right and the decision below is wrong, because *Willenbrock* is in accord with the common law and the construction given in that opinion to the definition of enemy, when a status resulting only from residence, is supported by the legislative history of the Act, as is explained in Point II, *infra*, p. 17.

Since in both *Willenbrock* and *La Mola* the case of *Swiss Nat. Ins. Co. v. Miller*, 267 U.S. 42 (1925) is cited, but in support of conflicting results, it is necessary to examine the citations and the opinion in the *Swiss Insurance Co.* case. In the *Willenbrock* opinion Judge Goodrich states:

> "The vesting order applies to the situation existing at its date. Swiss Nat. Ins. Co. v. Miller * * *." *Supra*, p. 238, App. D-5.

In the *La Mola* opinion the court quotes from the same case as follows:

> "'The word "enemy" * * * of course refers to the person who or corporation which fulfilled the definition of an enemy during the war.' Swiss Nat. Ins. Co. v. Miller, 267 U.S. 42, 45." *Supra*, p. 926, App. C-4.

In the opinion of this Court in *Swiss Insurance Co.*, Taft, C.J., states:

> "The plaintiff's petition admitted that *at the time of the seizure* the plaintiff was doing business in Germany, and was *then an enemy of the United States* under the definition [in Section 2 of the Act], and that the seizure was lawful." 267 U.S. 42, 44 (Emphasis supplied.)

The opinion states further:

> "The first contention, that because the company had ceased to do business in Germany after the seizure the Alien Property Custodian lost his right to continue to hold the property, can not be sustained. A change like this could not take away the status of the seized property as enemy property. The withdrawal from business in Germany might well involve a transfer of something of value from the plaintiff to enemy citizens or subjects and strengthen the enemy resources.
>
> "Second, it is argued that as the War ended by Joint Resolution of July 2, 1921 * * *, the plaintiff thereby ceased to be an enemy and was entitled to a return of its property without express legislation giving such a right. It is clear from Section 12 of the Trading with the Enemy Act * * *, that Congress did not intend that such a right should exist. One clause of that section provides:
>
> "'After the end of the War any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct.'
>
> "The argument for the appellant is that when the War ended, it ceased to be an enemy and so the words quoted do not apply to it. This is an

> impossible construction of the section. After the end of the War, there could be no enemy in the sense in which the appellant argues. The word 'enemy' used in Section 12 of course refers to the person who or corporation which fulfilled the definition of an enemy during the war. * * * " *Supra*, pp. 44-45.

The above quotation from the opinion of this Court makes it apparent that the decision supports the position in *Willenbrock*, that the date of vesting is the critical date. The quotation from the *Swiss Insurance* opinion in the *La Mola* case is of a sentence directed to the issue of whether a person who was an enemy at the time of seizure ceased to be an enemy in relation to the property seized by virtue of the legal termination of the war. There is no such issue in the cases at bar, nor in the *La Mola* case. The quotation made in the *La Mola* case is taken out of context. This Court should approve the application of *Swiss Insurance* made by the Court in the *Willenbrock* case, as set out in the opinion of Judge Goodrich, and should disapprove the interpretation of it in the *La Mola* case.

The court below also relied upon *Hansen* v. *Brownell*, 18 U.S. App. D.C. 230, 234 F. 2d 606 (1956); and *Bank Voor Handel en Scheepvaart, N. V.* v. *Kennedy*, 288 F. 2d 375 (1961), cert. den. 366 U.S. 962, as "lending some support to the position we take . . .". *Supra*, p. 926, App. C-5. *Hansen* held that a person who had cast his lot with the enemy and acted as an enemy agent could not recover his property although he had ceased so to act at the time of vesting. The court was careful there to reserve the question whether former residence in enemy territory could have that continuing effect. We submit that *Hansen* is right because by his own

free will Hansen had committed hostile acts in broadcasting enemy propaganda. By espousing the enemy's cause and actively aiding it, he had made an irrevocable choice. It is only just and proper that he should be accepted on his own terms, but that reasoning does not apply to one who is an enemy solely on the basis of residence when he has committed *no* hostile act. He is an enemy only because of his location in enemy territory and when that location ceases his enemy status should cease. This Court in commenting on *The Venus*, *supra*, in *Guessefeldt* v. *McGrath*, *supra*, noted a distinction between enemy status which follows location and enemy status arising from hostile acts and suggests the enduring quality of the latter. *Supra*, p. 318. See also, *Miller* v. *United States*, (U.S.) 11 Wall. 268, 310, 311 (1870). *Hansen*, then, is no authority for the court's decision in *La Mola*.

Bank Voor Handel clearly has no relevance because there the property was seized during the enemy occupation and petitioners do not dispute that property which was enemy owned at the time of its seizure cannot be recovered in a 9(a) action. The question, however, is whether one who has had enemy status solely on the basis of residence remains an enemy after he has changed his residence to non-enemy territory prior to the vesting of his property.

In *La Mola* the court below cites also *Orme* v. *Northern Trust Co.*, 410 Ill. 354, 102 N.E. 2d 335 (1951), cert. den., *Hardenberg* v. *McGrath*, 343 U.S. 921, to the effect that "technical enemy status" is not terminated with the end of hostilities. *Supra*, p. 926, App. C-4. Petitioners do not dispute that point. Since the *Orme* case deals with "resident German nationals" at the time their property was vested in 1949 (102 N.E. 2d,

at 335), it has no bearing on the cases at bar in which all the petitioners were non-residents of Germany on all the vesting dates and one of them—Laura Irene de Courten—was not a German national on the principal vesting dates.

In *La Mola* the court states that, "The purposes of the Act are not fulfilled if all vesting and seizure must be accomplished during hostilities or enemy occupation," *supra*, p. 925, App. C-3, and goes on to observe that if the enemy controlled property is not discovered during the period of enemy occupation its usefulness to the enemy is not obviated. To the extent that this is true, it is so only during the period of enemy occupation, in the *La Mola* case, and during the period of residence in enemy territory in the cases at bar. See *Miller* v. *United States*, *supra*, p. 306. Any possible enemy control having been terminated either by the expulsion of the enemy from the occupied territory, or by the removal and change of residence by the former residents in enemy territory, it is submitted that no possibility continues to exist for enemy use of the property. This is all the more emphatic when a vesting is effected after hostilities have ceased. The only function of vesting thereafter is clearly shown by the statement of the court that if recovery is permitted it would "deprive the United States of valuable means of supporting its own war efforts". *Supra*, p. 926, App. C-4. The court then states, "Those efforts, and the heavy responsibilities consequent upon a war, persist long after hostilities have ceased and occupied countries have been freed of the enemy." *Supra*, p. 926, App. C-4. It is difficult to see how the "war efforts" were continuing in the years of 1950 and 1951, years of vest-

ing with which the court was concerned in the several cases at bar and in *La Mola*.

It is submitted that the real decision as applied to the cases at bar is that the American inheritances (future interests which had not come into possession and enjoyment) of certain descendants of an American family are confiscated, not for use in prosecution of the war, but merely to reduce the cost of the war to the United States. While no objection can be raised to requiring an enemy nation to contribute to the cost of the war, this contribution must be as a nation and not as a levy on particular individuals. The justification for taking property of enemy individuals after hostilities have ceased, as is suggested in *Propper* v. *Clark*, 337 U.S. 472, 484 (1949), rests on the assumption that the individual whose property is taken may look to the enemy nation for reimbursement.* No such possibility exists for persons who years before the vesting relinquished their residence in enemy territory and have established a new life in another country, and as in the cases at bar, have relinquished enemy citizenship. To take the American inheritance of individuals whose only connection with the enemy is a past residence in

* It should be noted for example that in the Treaty of Versailles, it was expressly provided that the enemy nation (Germany) undertook to compensate her nationals in respect of the sale or retention of their property, rights or interests in the United States [and other allied or associated states]. (Article 297(d), (i) of the Treaty of Versailles) Treaties, Conventions, International Acts, Protocols and Agreements between the United States and Other Powers—1910-1923 Vol. III, pp. 3331, 3462, 3464. Article V of the Bonn Convention between the Federal Republic of West Germany and the United States, 1952, TIAS 3425, provided that the Federal Republic of Germany would compensate its own nationals for property which the United States and its allies had confiscated as "enemy".

an enemy country is a consequence barbarous and uncivilized.

Persons who committed no hostile act against the United States, who by their own free choice and with the permission of the Allied Occupation Authorities abandoned Germany to make their lives elsewhere, should not, after effectuating that decision be treated in the same manner either as persons who have committed a hostile act against the United States, or persons who by their own free will and choice desire to remain and bear the fate of the conquered enemy nation. Petitioners did everything within their power to sever their ties with an enemy nation. They should not have those ties thrust back upon them by a strained construction of a statute which can serve no wartime purpose or function and can only serve to prevent petitioners' receiving remainder interests of substantial value in American trusts created for them by their American relatives.

The reason given by the court in an attempt to justify confiscation that "Property subject thereto [vesting] during enemy occupation is available to the control of the enemy in aid of its warfare against the United States and its allies." *Supra*, p. 925, App. C-3 has no validity now and had none during World War II. Enemy property within the United States could not be used against this country or its allies because of the Treasury's wartime freezing controls.*

The conflict between the decision of the Court of Appeals for the District of Columbia Circuit and the Court of Appeals for the Third Circuit should be resolved by this Court. The Trading with the Enemy

* Executive Order No. 8389, as amended, 6 F.R. 2897.

Act is permanent legislation "effective at the time of any future war unless repealed or superseded". *Markham* v. *Cabell*, 326 U.S. 404, 409 (1945). Enemy property was treated under it in World War I, and all alien property was dealt with under it in World War II. With regret it must be said that it may come into use again at a time soon or remote. It is only fair to all our alien friends throughout the free world who have entrusted their property to our financial institutions, or otherwise have property here, to tell them what the rules applicable to their property interests will be, and under what circumstances they may find their property confiscated even without their support of an enemy cause.

II

THE DECISION OF THE COURT BELOW IN ENLARGING THE DEFINITION OF "ENEMY" IN THE ACT BEYOND ITS SCOPE AT COMMON LAW, THE LITERAL CONSTRUCTION OF THE DEFINITION, AND THE APPARENT CONGRESSIONAL INTENT, HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT

A. At Common Law Residence in Enemy Territory Prior to the Time of Seizure of the Property Was Irrelevant

At common law the validity of wartime confiscation of the property of non-combatants (in the absence of hostile acts) was adjudicated in the prize seizure cases, and they are unanimous in holding that the enemy or *non-enemy character* of the owner of captured property depends on whether *at the time of capture* he resided within enemy territory. *The Friendschaft* (U.S.), 3 Wheat 12 (1818); *The Venus* (U.S.), 8 Cranch 253 (1814); *United States* v. *Guillem* (U.S.), 11 How. 47 (1850); *The Francis*, 1 Gall. 614, Fed. Cas. No. 5034

(1813), aff'd (U.S.) 8 Cranch 363; *Duguet* v. *Rhinelander*, 2 Johns. Cas. (N.Y.) 476 (1802).

The leading case, of course, is the celebrated English case *The Indian Chief*, 3 C. Rob. 12 (Eng. 1801), which holds that enemy character gained by residence in enemy territory ceases by change of residence to non-enemy territory with respect to property not then seized. That principle of law first laid down in the English courts was adopted by this Court in *The Venus*, *supra*, where it was held that an American citizen resident within an enemy country at the time of the seizure of his property was properly treated as an enemy because of the enemy character he derived from his residence. But Mr. Justice Washington expressly adopted the principle laid down in *The Indian Chief*, *supra*, and said:

> "... this national character which a man acquires by residence, may be thrown off at pleasure, by a return to his native country ... To use the language of Sir W. Scott, it is an adventitious character gained by residence, and which ceases by non-residence ... Having once acquired a national character by residence in a foreign country, he ought to be bound by all the consequences of it, until he has thrown it off ... by an actual return to his native country ..." *Supra*, pp. 280, 281.

In the Mexican War in the case of *United States* v. *Guillem*, *supra*, the property of a French citizen not engaged in trade who resided in Mexico during part of the war, was seized after his departure from Mexico for France in the midst of the war. His property was returned, Mr. Chief Justice Taney saying for this Court:

> "The hostile character which his domicile in Mexico had impressed upon him and his property

> had . . . been thrown off; and as soon as he sailed from Vera Cruz he resumed the character of a French citizen, and as such was entitled to the rights and privileges of a neutral, in regard to his property, as well as in his person." *Supra*, p. 60.

And, in the case of a citizen of an enemy nation who was resident in a neutral country at the time of the seizure of the property, it was held that he was entitled to a return notwithstanding a sojourn in the territory of an enemy country at the time of instituting suit. *The Friendschaft, supra.*

So, too, in *Duquet v. Rhinelander, supra*, where a Frenchman in the midst of a war between France and England, emigrated to the United States from France, it was held by New York's highest court that his property seized by the English after he had established his residence in the United States was neutral property.

It is clear beyond peradventure of doubt that at common law enemy status acquired solely on the basis of residence is lost by a change of residence. The decision in *Willenbrock* accords with the common law. The decision of the court below in the instant case in holding that once an enemy by virtue of residence, always an enemy, is directly contrary to the principle of the common law.

B. A Reading of the Act and Its Legislative History Shows No Congressional Intention to Change the Common Law Rule

The court below in upholding the confiscation in *La Mola*, without even mentioning the legislative history of the Act, stated:

> ". . . we think that in the absence of clearer language indicating the necessity for a different construction the enemy status appellant acquired

during the occupation continued, insofar as section 9(a) is concerned, to the time of the vesting order; that is, we think that at that time the end of hostilities and of the occupation of the Netherlands had not removed appellant from the technical enemy status it had acquired during the occupation." *Supra*, p. 926, App. C-4.

The court below, in summarily deciding the instant case on the basis of *La Mola*, held that once an enemy by virtue of residence, always an enemy, even though the residence is changed to non-enemy territory. That holding is contrary to a fair reading of the Act and is contrary to the intention of Congress as shown by the Act's legislative history.

Section 2 of the Act in pertinent part provides:

"The word 'enemy,' as used herein, shall be deemed to mean for the purposes of such trading and of this Act—

"(a) any individual, . . . resident within the territory . . . of any nation with which the United States is at war, . . ."

It must be observed that the Act does not define the term "enemy" as "any individual *who at any time* [during the war] *has been resident* within the territory of any nation with which the United States is at war", but that is the definition of enemy by virtue of residence enunciated by the court below. If that is what Congress intended it could well have said it. But Congress did not use that language in Section 2. Thus a plain reading of the Act casts considerable doubt upon the construction of the Act given by the court below in *La Mola* and adopted in its decision of the cases at bar.

The legislative history of the Act makes it abundantly clear that the definition of enemy was intended

to be within the common law rule. The House report on the bill which became the Trading with the Enemy Act (H. Rep. 85, 65th Cong. 1st Sess., June 21 (1917), stated:

> "The purpose of the bill is not to create new international rules or practices but to define and mitigate them."
>
> "The first modification is found in the definition of the word enemy."

Since, then, no new rules were created, Congress intended to enact into the statute the international and common law rule that enemy status acquired on the basis of residence in enemy territory is lost by a change of residence to non-enemy territory prior to seizure.

Subsequent amendment to the Act leaves no room for doubt that both the Executive and the Congress understood the definition of enemy to mean enemy at the time of seizure. In the hearings which the House held on an amendment to the Act (H. Comm. Hearings, 1920, Vol. 232-1, Point 8) the following exchange occurred between the Chairman of the Committee and the Assistant to the Solicitor of the State Department:

> "The Chairman: Does the seizure and retention of this property by the Alien Property Custodian, of citizens of Czechoslovakia, Yugo-Slavia, Bulgaria, Turkey and Alsace-Lorraine, involve any embarrassment on the part of the State Department?
>
> "Mr. Hill [Assistant to the Solicitor of the Department of State]: It does; yes, sir. In addition to that, they have taken the property of the citizens of Switzerland, Holland and other neutral countries, *who at the time, by reason of residence in Germany or otherwise, were included in the term*

> *'enemy'* . . . The custodian cannot release it, and the Attorney General cannot upon application, act favorably, because it was, technically, *enemy property at the time* . . . This government has recognized the existence of that country [Czechoslovakia] through the Executive, and yet we continue to hold property of its citizens which we cannot release at this time without an amendment of the Act *because they were enemies at the time the property was taken over.*" Quoted in *Swiss Nat. Ins. Co.* v. *Miller, Supra,* p. 66.

The court below in *La Mola* in deciding that once an enemy always an enemy, does refer, however, to the Joint Resolution of Congress of October 19, 1951,* which provided that:

> "* * * any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading with the Enemy Act of October 6, 1917 * * * as amended, or which has heretofore been vested or seized under that Act * * * shall continue to be subject to the provision of that Act * * *."

The court said:

> "This included appellant's property, for during the occupation which preceded January 1, 1947, that property had clearly been subject to vesting and seizure." *Supra,* p. 925, App. C-3.

The court in upholding the confiscation overlooked that part of the Joint Resolution which states:

> "* * * Nothing herein * * * shall alter the status, as it existed immediately prior hereto, under that Act of Germany or of any person with respect to any such property or interest."*

*65 Stat. 451 (1951), 50 U.S.C. Appendix note preceding § 1 p. XX (1958).

This Resolution has no bearing on the cases at bar. It expressly provides that it does not alter the status as it existed immediately prior to the Resolution of any person with respect to any property interest. Their status, petitioners assert, on the grounds stated herein, was the same immediately prior to the Resolution as on the date of vesting, namely, that of persons not "enemy" and therefore entitled to the return of their property. Clearly, the Joint Resolution was intended only to continue the vesting power so that the vesting program could be brought to an orderly close even though the war was declared formally terminated. It did nothing to change the definition of enemy.

III

THE DECISION IN THE COURT BELOW BY ENLARGING THE DEFINITION OF "ENEMY" IN THE ACT HAS RAISED A CONSTITUTIONAL QUESTION—WHETHER IN THE EXERCISE OF THE WAR POWER PROPERTY CAN BE CONFISCATED WITHOUT ANY COMPENSATION ON THE SOLE GROUND THAT THE OWNER HAD FORMERLY RESIDED IN ENEMY TERRITORY—WHICH QUESTION THIS COURT SHOULD SETTLE

The Fifth Amendment requires just compensation upon the taking of property, even if for the prosecution of a war, and even if the property belongs to an alien, if not an "enemy". *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931); *Silesian American Corp.* v. *Clark*, 332 U.S. 469, 479-484 (1947). Of course compensation is not required when property of an "enemy" is taken. *United States* v. *Chemical Foundation*, 272 U.S. 1, 11 (1926).

The problem of whether "any national of an enemy country [is] within the reach of constitutional protection" is posed in the opinion in *Guessefeldt* v. *McGrath*,

342 U.S. 308, 318 (1952). There this Court held that a German citizen physically present but not resident in Germany during World War II might maintain an action under Section 9(a) of the Act. This decision was reached because of the presence of a constitutional problem "not imaginary", and the desirability of a construction of the Act which by a fair reading avoids confiscation. *Supra*, p. 319. These were two of the considerations which brought about a construction of the Act which limited the scope of the language of Section 39 of the Act, which section, if it had stood alone, would clearly have forbidden any recovery.*

The court below in *La Mola* dismisses the *Guessefeldt* decision by stating that this Court found, "that the claimant [Guessefeldt] never came within the definition of an enemy". *Supra*, p. 927, App. C-6. It is submitted that the court below has unduly restricted the scope of the opinion in the *Guessefeldt* case.

In discussing the question of whether any national of an enemy country has constitutional protection, Mr. Justice Frankfurter refers among other decisions to *The Venus* (U.S.), 8 Cranch 253 (1814), which

> "* * * seems to say that at common and international law, in the absence of hostile acts, enemy status, at least for the purpose of trade, follows location and not nationality." *Supra*, p. 318.

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* The first sentence of Section 39 reads as follows:

"No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein." *Guessefeldt* v. *McGrath*, *Supra*, p. 310.

The Venus is one of a considerable group of cases on enemy status, of which a number are discussed herein at pp. 17-19, *supra*. It is perfectly clear from them specifically *The Friendschaft* (U.S.), 3 Wheat. 14 (1818); *United States* v. *Guillem* (U.S.), 11 How. 47 (1850); and *Duguet* v. *Rhinelander*, 2 Johns. Cas. (N.Y.) 476 (1802) that at common law the change of domicile to a neutral country, for a legitimate and not a fraudulent purpose is effective. In the last cited case, a decision by the Court of Errors, then the court of last resort in the State of New York, it appeared that a French citizen during war between France and England had emigrated to the United States and had become domiciled here. He took out insurance on certain property belonging to him which was captured on the high seas by a British vessel. The court held that his warranty of neutral property was not broken, and permitted him to recover on the insurance for a total loss. The *Guillem* case makes it clear that the rule is not limited to the purposes of trade.

From those cases the conclusion follows that at common law a change of residence may make a person not an enemy, though he was an enemy before. It is submitted that it is a real question, recognized in *Guessefeldt*, whether a person who is not an enemy at common law may be declared to be an enemy, so far as it concerns the constitutional right not to have his property taken without just compensation.

The constitutional right here asserted only prevents confiscation. It does not interfere in any way with the exercise of the war or other powers of Congress in the prosecution of any war. All alien property may be blocked or vested, either for the use of the United States or to prevent its use by an enemy power. "The

problems of compensation may await the judicial process." *Silesian American Corporation* v. *Clark*, 332 U.S. 469 476 (1947).

It must be borne in mind that one of the petitioners, Laura Irene de Courten, at the principal times of vesting was not a German national or citizen, but was a resident and citizen of Switzerland and so a friendly alien. The other petitioners, who were minors, were then under Swiss and not German guardianship, and were Swiss residents. They subsequently became Swiss citizens. (R. 58, 59.) Accordingly, this Court should declare that since at common law petitioners herein when they had taken up their residence in Switzerland were friendly and not enemy aliens, they are protected by the Fifth Amendment and Section 9(a) of the Act from the confiscation of their property. Since the apparent remedy of the petitioners as to bring an action under Section 9(a), and since as is shown herein, and as *Willenbrock, supra*, holds, the Act is clearly open to that construction, this Court should not construe the Act to deny petitioners a remedy and leave them to enforce a constitutional right in the Court of Claims. This Court avoided such a result in *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 487, 488 (1947). Unquestionably the Government would claim suit in the Court of Claims was barred by the statute of limitations. See, Brief for Respondent in Opposition to petition for certiorari in the *La Mola* case, at page 14.

IV

CERTIORARI MUST BE GRANTED IN THE CASES AT BAR UPON THE GRANTING OF CERTIORARI IN THE LA MOLA CASE TO PREVENT INJUSTICE

The opinion *per curiam* in the Court of Appeals in the cases at bar was bottomed exclusively on the *La Mola* decision and opinion. At the argument of the cases at bar the decision and the opinion in that case had not been handed down. It was therefore impossible for petitioners to analyze the opinion and argue thereon to the Court. Since, as is stated by Chief Judge Miller, that opinion is a binding precedent which prevented his dissent, it was not open to petitioners to ask for re-argument in the Court of Appeals in order to establish whether or not a majority of the full bench of the court was of a contrary opinion.

The fate of petitioners having been determined by the *La Mola* case in the court below, relief granted in that case must be extended to the petitioners herein to prevent a procedural injustice, which would result if the decision in the cases at bar became final and thereafter the decision in the *La Mola* case was reversed.

CONCLUSION

Both the Court below and the Court of Appeals for the Third Circuit have construed the Trading with the Enemy Act, permanent Federal legislation, and have arrived at directly opposite conclusions. The Third Circuit has construed the Act in accordance with the common law and the Congressional intention as shown by the legislative history. The Court below has departed from the common law and has given no indication that it considered the legislative history. In so

doing, it has decided a constitutional question which this Court has said is debatable and should be avoided. Moreover, the court below in construing the Act has flouted the admonition of this Court that:

> "Considering that confiscation is not easily to be assumed, a construction that avoids it and is not barred by a fair reading of the legislation is invited." *Guessefeldt* v. *McGrath*, *supra*, p. 319.

The decision of the court below expands the statutory definition of "enemy" to confiscate future interests which had not come into possession and enjoyment belonging to friendly aliens, who at one time resided in enemy territory. It lays down rules which will govern the confiscation of property entrusted to United States business and financial institutions by aliens sympathetic to this country and the free world. It should not be permitted to stand.

The fortunes of the four petitioners have hung in the balance for more than a decade since the vesting orders. These descendants living abroad of an American family should receive from this Court the relief to which they are entitled by law, blocked only by the *La Mola* decision.

It is of the utmost importance that individuals should be protected in their property as well as their lives, and the statute, the common law, and the Constitution should be definitively construed by this Court to that end.

Wherefore petitioners pray that a writ of *certiorari* may issue.

Respectfully submitted,

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